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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 30.

KEITH MARTIN,
Appellant,

vs.

HEREERT WALTON AS PROBATE JUDGE OF JOHNSON COUNTY, KANSAS,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF APPELLEE.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF APPELLEE.

JURISDICTION.

The judgment of the court below was entered on December 10, 1960 (R. 19). Appeal was timely perfected therefrom and probable jurisdiction was noted by the Court on March 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(2). It is respectfully

suggested that the judgment rests on an adequate non-federal basis since the relief sought by appellant, a writ of mandamus to appellee's predecessor in office, was not to compel the performance of any act which the law required appellee's predecessor to perform as a duty resulting from his office, but the purpose of the writ sought was to establish a legal right in appellant not authorized, and in fact prohibited, by statute and the Rules of the Supreme Court of the State of Kansas which were binding upon appellee's predecessor in office.

STATUTES INVOLVED.

In addition to the statutes set out in appellant's brief, appellee deems the following provisions of the 1949 Kansas General Statutes to be pertinent.

Kan. G.S. 1949, 60-1701:

> "Jurisdiction; purposes generally. The writ of mandamus may be issued by the supreme court or the district court, or any justice or judge thereof, during term or at chambers, to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust, or station; but though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion. (L. 1909, ch. 182, Sec. 714; May 29; R.S. 1923, Sec. 60-1701.)"

Kan. G.S. 1949, 59-2501 (referring to probate courts of the state):

> "Rules may be promulgated. Appropriate rules of court not inconsistent with the provisions of this act may be promulgated by the supreme court to regulate the practice in matters covered by this act. (L. 1939, ch. 180, Sec. 278; July 1.)"

Kan. G.S. 1949, 60-3825:

> "Supreme court rules of procedure authorized. The judges of the supreme court may make and amend, from time to time, such further rules for the regulation of procedure in the supreme court and inferior courts consistent with this code, as they may deem proper. (L. 1909, ch. 182, Sec. 753; May 29; R.S. 1923, Sec. 60-3825.)"

QUESTIONS PRESENTED.

1. Whether the judgment sought to be reviewed rests on an adequate non-federal basis?

2. May the Supreme Court of Kansas in the exercise of its powers concerning the practice of law within its jurisdiction, promulgate rules to regulate the practice of law within the state by attorneys who are regularly engaged in the practice of law in other jurisdictions although such attorneys are licensed to practice in Kansas?

STATEMENT.

The statement of facts set forth in appellant's brief is accurate insofar as it relates to the allegations of his petition for mandamus. A motion to quash the alternative writ of mandamus was sustained (R. 13) and, therefore, no issue of fact has been adjudicated and the truth of the facts pleaded is admitted for the purpose of determining their legal effect. It should be noted that in its ruling, the trial court stated that there was no clear-cut duty on the part of the defendant (appellee's predecessor) to permit the plaintiff (appellant) to practice before his court without compliance with amended Rules 41 and 54 of the Supreme Court of Kansas (R. 12).

Appellant also in his statement extensively reviews the facts of *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190 (1959), appeal dismissed 361 U.S. 374 (1960), which involved the same contentions of appellant that he advances herein. While appellant makes the assertion here that he has been deprived of substantial property rights, he made the following statement under oath in the proceedings in the Taylor case:

> "Mr. Scott: May I ask you one question, Mr. Martin? Has any lawyer or any member of the Bar of the State, of Johnson County or Wyandotte County, ever refused to act as local counsel with you and for you in any case?
>
> "Mr. Martin: No. In fact, practically all of them have volunteered to do it without pay; however, I believe through the years that although it is an act of friendship and courtesy, now, it would out of plain decency, require compensation. . . ."

Appellee discloses the above fact which may raise a question as to whether the instant case presents a justiciable issue or merely an abstract question which should be dismissed for want of jurisdiction. *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923).

SUMMARY OF ARGUMENT.

The relief sought by appellant herein was a writ of mandamus from a Kansas trial court directing the judge of a probate court to permit appellant to practice before the probate court in violation of rules of the Supreme Court of Kansas which were binding upon the probate judge. The probate judge had no clear, legal duty to disregard such rules, but was legally obligated to follow and enforce such rules. Mandamus clearly will not issue for such purpose and

the trial court quashed the alternative writ issued. On appeal, the Supreme Court of Kansas did not dismiss on this ground, but proceeded to adjudicate the constitutional issues raised by appellant, probably because the attack was leveled against rules promulgated by that court. Since appellant chose to seek a remedy to which he was not entitled under any construction of the facts and law, this appeal should be dismissed.

The rules promulgated by the Supreme Court of Kansas, the constitutionality of which are drawn in question by appellant, provide in substance that an attorney who is regularly engaged in the practice of law in another state, even though licensed to practice in Kansas, may be recognized as an attorney by the courts, commissions and agencies of Kansas only if he has associated and personally appearing with him an attorney who resides and maintains his law office within the judicial district in which the action is filed or pending, upon whom service may be had in all matters connected with such action or proceeding. For some time prior to the promulgation of these amended rules, the Supreme Court of Kansas had been confronted with situations wherein counsel, who were licensed to practice in Kansas, but who regularly engaged in practice in other jurisdictions, would appear in the Kansas courts, relying on their knowledge of the law of the state of their regular practice. When that law did not coincide with the applicable law of Kansas, the interests of the clients suffered. The fact that this group of lawyers regularly engaged in practice elsewhere led to difficulties in securing their attendance before Kansas courts and commissions and presented problems in securing service of notices and pleadings. Other adverse results stemmed therefrom and the Supreme Court of Kansas, determining that the state's legal system was detrimentally affected

thereby, promulgated the amended rules with the noted effect. The amended rules are a proper exercise of the police power of the state to promote the general welfare of its citizens and tend to benefit the administration of justice within the state.

The amended rules are fair and reasonable and were clearly designed to remedy an existing evil detrimental to the state's legal system. Their effect is to tend to secure the interest of its citizens in able representation before the courts and commissions of the state and the interest of the public in the best possible administration of justice by the state's legal system. The standard established by the amended rules is clear and certain and needs no judicial interpretation. The amended rules fully meet the test of the Due Process Clause of the Fourteenth Amendment.

The classification established by the Supreme Court of Kansas to achieve the intended beneficial purpose was neither capricious nor arbitrary, but based upon a reasonable consideration of difference or policy resulting from the experience of the rule making body. The amended rules are designed to accomplish a legitimate purpose of the exercise of the state's police power and do not violate the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT.

I. Appellant Was Not Entitled to the Relief Sought Since Appellee's Predecessor Did Not Refuse to Perform Any Duty Imposed on Him by Law.

Appellant instituted this proceeding in mandamus to secure a writ from the District Court of Johnson County, Kansas, directing the Probate Judge of said County to permit appellant to violate amended Rules 41 and 54 of the Supreme Court of Kansas and Kan. G.S. 1949, 7-104 (R. 6). The appropriate statute, Kan. G.S. 1949, 60-1701, set out at length above, permits the writ only to compel the performance of any act which the law specially enjoins as a duty resulting from an office. Appellant did not allege any law which compelled the performance of the act sought, but on the contrary alleged that the Probate Judge was complying with the rules of the Supreme Court of Kansas which were binding upon him.[1] Mandamus is a discretionary writ and will be allowed only to require a plain and indisputable duty imposed by law and will not be allowed to avoid the effects of law.[2] Nor will manda-

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1. Kan. G.S. 1949, 59-2501 and 60-3825, set out at length above. In his motion filed in this Court to substitute Herbert Walton in the place of Joseph S. Davis as the party appellee, appellant frankly states:

> "It is mandatory that the said Herbert Walton, as Probate Judge of Johnson County, Kansas, follow said rules as construed and applied by the Kansas Supreme Court."

The same contentions advanced by appellant herein had previously been decided adversely to him in *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190 (1959), appeal dismissed 361 U.S. 374 (1960).

2. *United States* v. *Ickes*, 98 F.2d 271 (D.C. Cir. 1938), certiorari denied 305 U.S. 619 (1938); *Miller* v. *Jackson*, 166 Kan. 141, 199 P.2d 513 (1948); *In re Insurance Tax Cases*, 160 Kan. 300, 161 P.2d 726 (1945), affirmed 328 U.S. 822 (1946), rehearing denied two cases 329 U.S. 819 (1946).

mus lie to compel a public officer to do a particular thing which his superior in authority has lawfully ordered him not to do. *Butterworth* v. *United States*, 112 U.S. 50 (1884).

Appellant did not seek to enforce a legal right which had been established, but sought to establish the right in this action. It is well settled that mandamus will not issue for such purpose.[3] If mandamus should be resorted to only in the most extreme cases to require a lower court to follow the rules promulgated by a higher court,[4] what right does a party have to a writ from an intermediate court directing a lower court to disregard the rules of a higher court with the power of making rules for the lower court? If it can be said that a court abuses its discretion in following the rules promulgated by a superior court with inherent and statutory authority so to do, then our system of justice becomes merely a collection of separate entities, each free to disregard the existence, rules and opinions of the others.

The trial court recognized the controlling rule of law and stated that under the facts alleged in this petition, there was no clear-cut duty on the part of appellee's predecessor to permit appellant to practice before his court

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3. *Supervisors of Carroll Co.* v. *United States*, 85 U.S. 71 (1873); *United States* v. *Nordbye*, 75 F.2d 744 (8th Cir. 1935), certiorari denied *Love* v. *Nordbye*, 296 U.S. 572 (1935). It has also been held that mandamus will not lie to compel a federal District Court to admit a petitioner to its bar, notwithstanding petitioner's contention that it was the clear duty of the District Court so to do. *In re Flasphaler*, 228 F.2d 53 (D.C. Cir. 1955), certiorari denied 351 U.S. 973 (1956), rehearing denied 352 U.S. 861 (1956).

4. *Howes Leather Co.* v. *LaBuy*, 226 F.2d 703 (7th Cir. 1955), affirmed 352 U.S. 249 (1957), rehearing denied 352 U.S. 1019 (1957).

without compliance with amended Rules 41 and 54 of the Supreme Court of Kansas (R. 12). This point was urged by appellee's predecessor in the proceedings in the Supreme Court of Kansas, but that court chose to adjudicate the broad issue presented by the pleading. Its reason for so doing may be assumed from the fact that it had promulgated the rules attacked and a reading of appellant's brief will disclose that, in substance, he charges the members of the Supreme Court of the State of Kansas with bad faith, lack of knowledge, or a combination thereof, in the promulgation of the subject rules. A court thus attacked may choose to overlook strict legal grounds for dismissal of the action in order that the litigant may have his full say and his arguments be answered even though clearly not entitled to the relief prayed. This Court need have no such reluctance and it is respectfully submitted that this appeal should be dismissed for the reason that appellant was not entitled to a writ of mandamus herein since appellee's predecessor did not refuse to perform any act which the law required of him as a duty resulting from his office.

II. Due Process.

A. The Rules Promulgated by the Supreme Court of Kansas Do Not Deprive Any Person of Property Without Due Process of Law, but Are a Proper Exercise of the Police Power of the State.

The broad question before the Court for decision is one dealing with the police power of the state. Specifically, it is a question of the regulation of the legal profession. At issue is whether the State of Kansas, by its Supreme Court, may regulate the members of its bar. Included is the *ad hoc* proposition of whether the subject rules of the Supreme Court of Kansas (R. 6-7) are a valid exercise of the state's regulatory powers.

Appellant grudgingly admits that courts, including this Court, have repeatedly affirmed the basic rule that the practice of law is a privilege and not a right. Appellant also concedes that lawyers occupy a unique position in our judicial system as officers of the court. However, appellant baldly states that the repeated enunciations of such principles are dicta and may be disregarded (Br. 15). Appellant asks this Court to forget what was only recently said in *Lathrop* v. *Donohue*, U.S. , 6 L Ed. 2d 1191 (1961) and *Cohen* v. *Hurley*, 366 U.S. 117 (1961). Admittedly a lawyer's status and rights are not by the grace or whim of the court, but the lawyer having been granted the privilege of practicing law must adhere to high standards and is subject to the continuing regulation of the court.

Appellant does not argue the Kansas court has no power to regulate its bar, but that the rules in question were designed by the Supreme Court of Kansas to prevent appellant from practicing law in Kansas. Of course, while appellant has not cited one instance where his privilege of practicing in Kansas has been denied, he contends that appellee's predecessor informed him that he could not practice in his court without following the rules of the Supreme Court of Kansas regulating practice by lawyers who regularly practice in states other than Kansas. Appellant admittedly practices regularly in Missouri (R. 2-3), but contends from the fact that he shares an office in Kansas and has some Kansas law books at his home (R. 32), that he actually practices regularly in Kansas also. The facts in appellant's petition before the trial court were taken to be true for the purposes of the motion to quash the writ; also, the facts stated in the opinion of the Supreme Court of Kansas in *Martin* v. *Davis*, 187 Kan. 473, 357 P.2d 782 (1960) (R. 17-32), are properly before this Court.

The appellant, in arguing that amended Rules 41 and 54 as promulgated by the Supreme Court of Kansas are a denial of due process of law, relies to a great extent on the case of *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957). Appellee has no quarrel with either the result of the *Schware* case or the general principles therein stated as they relate themselves to the question of due process of law. Appellee does contend, as the Supreme Court of Kansas found (R. 26), that what was said and held in the *Schware* case is not controlling in the instant case.

The Court will recall that Schware claimed to be denied due process of law by reason of the New Mexico Board of Bar Examiners arbitrarily and capriciously finding his moral character to be such that he was not qualified for admission. The regulation or rule as such and its constitutionality were not in question, so that the sole issue was personalized to Schware. Did he have or did he lack the required moral character? Contrast that issue to the instant case wherein appellant freely admits he is regularly engaged in the practice of law in another state (R. 2-3), thereby placing himself clearly within the purview of amended Rules 41 and 54, but claims that said rules in and of themselves are a denial of due process of law and are thereby unconstitutional. This distinction is real and of utmost importance because this Court, in determining the constitutionality of the Rules of the Supreme Court of Kansas, must view them in light of their relationship to, and effect on, the public welfare, while keeping in mind the acts and failures of the entire group of lawyers classified under said rules. The individual acts, failures or legal ability of appellant cannot be decisive. Even if this Court should find that appellant personally is not and has never been guilty of any of the shortcomings amended Rules 41 and 54 were designed to remedy, such a finding could

not be the basis for adjudicating the rules to be unconstitutional. This Court has often stated that a legislative act is not to be refused application by the courts as arbitrary and capricious and forbidden by the due process clause merely because it is deemed in a particular case to work an inequitable result. *Wickard* v. *Filburn*, 317 U.S. 111 (1942). Admittedly, the rules of the Supreme Court of Kansas are of a legislative nature for the purposes of this case. *Lathrop* v. *Donohue, supra.*

Dent v. *State of West Virginia*, 129 U.S. 114 (1889), laid down basic principles repeatedly followed and cited over the years in the area of state regulation of professional persons. Dent had been engaged in the practice of medicine in West Virginia for approximately 6 years when a law was enacted requiring physicians to have been engaged in practice 10 years or present an acceptable diploma or pass an examination in order to continue in practice. Dent's diploma was not acceptable and he refused to take the examination. He claimed, among other things, that the statute destroyed his vested rights and deprived him of the estate he had acquired in his profession by years of study, practice, diligence and attention and deprived him of an established reputation as a practitioner. In upholding the validity of the statute in question as constitutional, this Court stated:

> "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or *tend to secure* them against the consequences of ignorance and incapacity. . . .
>
> "The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity.

> "It is only when they have *no* relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation." 129 U.S. at 122. (Emphasis supplied)

It is well settled that this Court has nothing to do with the wisdom, workability or fairness of a statutory plan of regulation. *Wickard* v. *Filburn, supra*, at 129.

The Supreme Court of Kansas, acting in a quasi-legislative capacity, prior to promulgating amended Rules 41 and 54, had actual knowledge and took judicial notice of several factors which in its judgment made the enactment of the amended rules advisable for the improvement of the existing legal system and the protection of litigants and the general public (R. 26-29). Of course, the accumulative judicial wisdom and knowledge gained by the Supreme Court of Kansas from the cases presented to it for decision were also brought into account in the formulation of the rules here under attack.

Such questions as docket congestion, the interest of the parties, the public interest in the speedy and efficient administration of justice, the raising of standards of professional knowledge of the Kansas Bar were certainly considered in the promulgation of amended Rules 41 and 54 of the Supreme Court of Kansas and the effect of those rules in practice is to secure, or tend to secure, the lawful and commendable purpose for which the court strove.

Faced with a serious threat to the best possible administration of justice in Kansas, a more detailed discussion of which will be set out in the next section of this brief, the supreme court amended its rules to include those in question. Disregarding the wisdom or workability of such regulations, do they meet the basic tests laid down in *Dent* v. *West Virginia, supra*?

(1) Do they secure or tend to secure the public against the consequences of ignorance and incapacity?

The Supreme Court of Kansas has every reason to believe that litigants before the courts and administrative bodies of Kansas probably will be, and certainly must tend to be, better represented when at least one attorney appearing on their behalf dedicates his full professional effort and day to day experience in striving for mastery of the varied ramifications of Kansas law.

(2) Are the regulations necessary?

The Supreme Court of Kansas, responsible for the level of the administration of justice in that state, certainly could find the regulations were necessary and this Court is charged with a primary dependence on the judgment of that body in this area. Examples of the factors which, in the opinion of the Supreme Court of Kansas, rendered the regulations necessary are set out in its opinion and in this brief.

(3) Do the regulations have any relation to the profession in question?

The expressed and obvious reason for the regulations is to require of lawyers, practicing before the courts and administrative bodies of Kansas, the highest possible degree of knowledge and skill in that state's law. Surely such knowledge and skill is basic to, and bears every relation to, the practice of law. In commenting on Kan. G.S. 1949, 7-104, enacted for the same purpose and also attacked by appellant, the Kansas court stated:

> ". . . It has been believed that lawyers not regularly practicing in the state are not usually entirely familiar with the law and procedure thereof and that the public is entitled to have adequate counsel; and

second, that the trial court should have complete and immediate jurisdiction over counsel appearing before it."[5]

The principles enunciated in the recent case of *Lathrop* v. *Donohue*, *supra*, lend support to the validity of amended Rules 41 and 54 of the Supreme Court of Kansas. If a lawyer admitted prior to the establishment of an integrated bar may be required to pay dues to such an organization for his continued privilege to practice law, may not the Supreme Court of Kansas also require a certain class of practitioners who regularly practice elsewhere to associate a full time Kansas practitioner as local counsel when appearing in Kansas courts. Appellant complains that the recommended fee schedules for the areas involved would deprive appellant of some of his income (Br. 10). Such complaint does not appear to be valid if his testimony is correct (P. 4, *supra*). Appellant, of course,

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5. *Thornburg* v. *McClelland*, 186 Kan. 20, 348 P.2d 617 (1960). It is also worthy of note that since the adoption of amended Rules 41 and 54, the Legislature of Kansas has met twice and has not seen fit to amend Kan. G.S. 1949, 7-104. In the 1959 Session, attorneys in the same category as appellant caused House Bill No. 377 by the Committee on Judiciary to be introduced. The bill proposed to amend Kan. G.S. 1949, 7-104, by adding the following italicized matter:

> "*Provided*, Nothing in this section shall be construed: (*a*) To prohibit any party from appearing before any of said courts, tribunals or agencies, in his own proper person and on his own behalf; *or* (*b*) *any person who has been regularly admitted to practice law in the courts of this state and whose certificate of authority to so practice has not been revoked or suspended and who resides in this state from appearing before, or in, any of said courts, tribunals or agencies as an attorney even though he may be engaged in the practice of law in another state or may maintain a law office in another state.*"

After public hearings thereon, including the testimony of experienced trial court judges, the bill failed to pass the Legislature.

does not recognize that this requirement of local counsel may aid his client's cause and that justice may be better served. Appellant's only concern is that *his* income *might* be less. As the Supreme Court of Kansas noted in *Martin* v. *Davis, supra*, many lawyers in the Greater Kansas City area confine their practice exclusively to one state and when business takes them to another state they employ counsel regularly practicing in the other jurisdiction in order to serve their clients better. While these lawyers may not be as intelligent as appellant, they apparently manage to earn a living and serve their clients by giving them the advantage of the best available knowledge on the applicable law.

As to appellant's assertion that he has been "effectively disbarred from practice in Kansas" (Br. 13), the Court need only read the subject rules to see that such statement is not accurate. He may do all acts embraced within the practice of his profession. The only effect of amended Rules 41 and 54 is to require that when he practices before the courts, commissions and agencies of Kansas, he must have associated and personally appearing with him an attorney who resides and maintains his law office within the judicial district in which the action is filed or pending upon whom service may be had in all matters connected with such action or proceeding. The legislative and judicial goal of certain, prompt service upon readily available counsel of record is patent. The further goal of the presence of counsel fully familiar with the procedural and substantive law of Kansas and the rules of courts and commissions in proceedings where immediate decisions must be made and there is no opportunity for research by one unfamiliar with the applicable law becomes as obvious upon reflection. As the court stated in *Taylor* v. *Taylor, supra*, at 328:

> ". . . Martin's license to practice law before the courts of the state of Kansas has not been in dispute nor has he been disbarred. . . ."

Appellant suggests that the Supreme Court of Kansas in conference created the facts of which it took judicial notice in an *ex post facto* reasoning for support of its already established rules in order to limit appellant's Kansas practice (Br. 26). However, appellant does not claim the facts judicially noted are not true and, as hereinafter noted, at least some of them were matters of public knowledge, recorded in the opinions of the court long prior to the promulgation of the amended rules attacked.

Appellant states that he has not been guilty of the shortcomings of other lawyers regularly practicing in other states. The record does not bear out this assertion, but assuming *arguendo* that appellant is without fault, this is not the test. The problems that amended Rules 41 and 54 seek to curb deal with a *class* of lawyers, just as the problems and aims of the Wisconsin integrated bar were concerned with the raising of the bar's standard and not those of Trayton L. Lathrop. So here too the Kansas court was looking to the public interest and not at an individual.

B. The Subject Rules of the Supreme Court of Kansas Are Fair and Reasonable.

Appellant contends that the subject rules are arbitrary and unreasonable and that the Supreme Court of Kansas took "extravagant judicial notice of facts—facts pertaining to hypothetical evils wholly without reference to him". (Br. 26). Naturally, the Supreme Court of Kansas took no notice of appellant's acts in particular for it was the acts of a class of attorneys which time after time challenged the court's attention by reason of the effect on their clients' rights of the lawyers' lack of knowledge of

Kansas law and their reliance on their knowledge of the law of another state without ascertaining the law of the forum.

Appellee will not burden this Court with an extended delineation of the acts brought to the attention of the Supreme Court of Kansas which showed the necessity for the rules subsequently promulgated, but reference will be made to two examples as an indicia. In *Felton* v. *Rubow*, 163 Kan. 82, 179 P.2d 935 (1947), an attorney regularly engaged in practice in Oklahoma instituted a proceeding in the District Court of Osage County, Kansas, although clearly under the probate code (now Kan. G.S. 1949, ch. 59, as amended), the proper forum was the probate court of that county. The district court sustained a motion to dismiss for want of jurisdiction, but even at that stage the plaintiff's attorney did not see the necessity of acquainting himself with the statutory law of Kansas and an appeal was taken to the Supreme Court of Kansas where the judgment of dismissal was affirmed. In its opinion, at 84, the Court stated:

> "Counsel for appellant is a nonresident of this state. Obviously he is not familiar with our statutes pertaining to the estates of deceased persons nor with the jurisdiction of our courts pertaining to such estates. He ignored our statute (G.S., 1945 Supp., 7-104), which required him to have an attorney in this state associated with him. Our recent legislature has amended the statute last mentioned (Senate Bill No. 234) with the hope of avoiding such miscarriages of justice in the future."

Even as against appellant's assertion that the hypothetical evils were without relation to him, the record is to the contrary. Appellant notes in his brief (Br. 8) the five cases which he has argued in the Supreme Court of Kansas and

one of these was *State* v. *Fletcher*, 174 Kan. 530, 256 P.2d 847 (1953). Appellant was the sole counsel for the accused in the trial court and in the appellate court. As to two of the errors specified by him on appeal, the opinion, at 531, states:

> "Appellant complains also of a ruling of the trial court excluding certain evidence. The excluded evidence was not produced on the hearing of the motion for a new trial and we have nothing to review. See *State* v. *Zeilinger*, 147 Kan. 707, Syl., Par. 3, 78 P.2d 845.
>
> "Appellant complains that the trial court erred in not instructing on claimed lesser offenses. No request was made for such an instruction. . . ."

While it is not suggested that appellant's individual actions were such as to require the promulgation of the amended rules, the Court can readily recognize that if an attorney of appellant's ability, as evidenced by his membership in Phi Beta Kappa and Order of the Coif (R. 2), should fail to follow the procedural law of Kansas by reason of his reliance on his knowledge of the law of the jurisdiction where he regularly practices, how much greater were the problems presented to the Kansas courts by attorneys in the same classification but with more limited abilities.

The rules of the Supreme Court of Kansas seem much more fair and reasonable than the result reached in *Virgin Islands Bar Association* v. *Dench*, 124 F. Supp. 257, 258 (1953), appeal dismissed 215 F.2d 810 (3rd Cir. 1954), where it was stated:

> "It is generally accepted that an attorney is an officer of the Court and, as such, an officer and arm of the state. See 7 C.J.S., Attorney and Client, Sec. 4, p. 706 and 5 Am. Jur. 264. It follows that one cannot be an officer of two different states at the same time, and it has always been the understanding of

this Court that a lawyer cannot practice in two jurisdictions at the same time.

> ". . . It is common practice, however, for courts to permit members of the bar of other states to appear as counsel on the trial or argument of particular cases, but not to admit them to general practice while they are actively practicing in another state. . . ."

The Supreme Court of Kansas took judicial notice prior to promulgation of amended Rules 41 and 54, of the problems arising where a lawyer keeps regular office hours daily in one state, and pays a nominal sum to keep his name on a door, a phone listed in his name, and has someone take his calls and forward them, all in another state; such problems as that of service of notices; of the necessity for a lawyer to keep up with changes in law and procedure; and, as important, or more so from a practical standpoint, the necessity of becoming and staying familiar with local court rules and practices (R. 26-28).

Another potent reason for the rules would appear to be the increased measure of control of lawyers before the bench. A Missouri lawyer with a Kansas license, is less likely to be as amenable to court discipline when he has a relatively safe place to which to retire, even though ultimately forbidden to enter Kansas courts by reason of his contumacy.

The mere fact that the Wyandotte-Johnson-Jackson-Clay-Platte county areas form Greater Kansas City, an urban economic unit, across state lines, does not change the fact that substantive law and procedure are different, often strikingly so, as in the case of property, titles, descents and distribution of estates and trial practice.

Again, no contention is advanced by appellee that appellant necessarily falls within any of the criticisms

and objections leveled above, but the fact that he claims to be personally free from the faults the rules were intended to prevent does not lessen their necessity, nor make them unreasonable or arbitrary.

C. The Standard Established in the Subject Rules Is Not Vague and Uncertain.

Appellant complains that the words "regularly engaged in the practice of law" were not defined by the Supreme Court of Kansas and, therefore, the rule is so vague and uncertain as to fall within the bar of the Fourteenth Amendment. It would appear that the words are self-defining and sufficiently establish a standard. What definition could the court have given which in itself would not have been more complex and less clear than the quoted language? However, if appellant is really in doubt, he may consult the opinions of the court in *State ex rel.* v. *Schmitt*, 174 Kan. 581, 258 P.2d 228 (1953); *Bradley* v. *Sudler*, 172 Kan. 367, 239 P.2d 921 (1952); and *Depew* v. *Wichita Association of Credit Men*, 142 Kan. 403, 49 P.2d 1041 (1935), certiorari denied 297 U.S. 710 (1936). A perusal of appellant's petition (R. 2-6) shows that at the time it was drawn, appellant had no question about the standard and its relationship to his activities. Appellant affirmatively alleged that he has practiced law in Missouri since 1947, maintains his office in the Bryant Building in Kansas City, Missouri, and that his Kansas license is affected so long as he "regularly" practices in Missouri. If "good moral character" is a sufficient standard, *Schware* v. *Board of Bar Examiners*, *supra*, how much more definite and certain is "regularly engaged in the practice of law". Both cases cited by appellant to this point were appeals from convictions under state criminal statutes and no reference is made to any case involving a factual situation

similar to the instant case. It is respectfully submitted that the elements of due process enumerated in *Dent* v. *State of West Virginia, supra,* are applicable and are fully met by the subject rules. Further, the trial court found that the original petition herein disclosed on its face that appellant is a member of the Missouri bar and regularly practices in that state and thus is within the purview of amended Rules 41 and 54 (R. 12). Appellant assigned no error to such finding in the proceedings before the Supreme Court of the State of Kansas (R. 14) and it is therefore conclusive.

III. Does the Equal Protection Clause Require That a State Be Denied the Right to Administer Its Courts and Attorneys Practicing Before Those Courts Based on a Classification of Those Regularly Engaged in the Practice of Law in Another State?

Equal protection of the laws as required by the Fourteenth Amendment is not violated by the classification imposed by amended Rules 41 and 54. The classification of Kansas licensed lawyers into those practicing within the state and those regularly practicing outside the state is based upon a substantial difference which has a reasonable relation to the public purpose to be accomplished.

The Supreme Court of Kansas did not arbitrarily arrive at the classification here made. Judicial notice was taken of many things which provide a rational and substantial basis for the classification (R. 26-28). The field of law is broad and varied. With few or no exceptions can the lawyer today be proficient in every daily demand —local agencies, rules and procedures differ as often as one crosses state boundary lines. It is reasonable to expect that a Kansas lawyer, regularly practicing in Kansas and devoting his full abilities and energies thereto, should

be better able to represent a client than a lawyer licensed in Kansas but regularly practicing in another state.

In *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 526 (1959), it was said of the Equal Protection Clause:

> ". . . But that clause imposes no iron rule of equality. . . . ."
>
> . . .
>
> " ' . . . If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' . . ."
>
> . . .
>
> ". . . Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. . . ."
>
> . . .
>
> ". . . We cannot assume that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy of the State. . . ."

Appellee has quoted above the tests required of a classification under the Equal Protection Clause of the Fourteenth Amendment. Appellee refers this Court to the reasons for the classification made by the Supreme Court of Kansas and submits that this "state of facts" sustains the classification established by the Supreme Court of Kansas.

Appellant would ask of the court that its rules should be subjectively classified; that the classification should be made vertically, based on individual personalities rather than horizontally as they now exist. Such vertical classi-

fication has odious overtones and on its face would appear to insure lack of equal protection of the law.

The Fourteenth Amendment and its guarantee to all citizens of equal protection of the law was not intended to stifle the state in the exercise of its police powers toward legitimate purposes."

A state can resort to any reasonable device to insure that those whom it is intended to regulate shall voluntarily submit thereto and this carries with it the right to influence their choice by attaching advantages to voluntary submission to the state's policy or disadvantages to a refusal to do so. Equal protection is not denied to those whose refusal to cooperate with the state involves a denial to them of advantages conferred on others who comply or the imposition of burdens from which the others are immune. See *Middleton* v. *Texas Power & L. Co.*, 249 U.S. 152 (1919); *Hawkins* v. *Bleakly*, 243 U.S. 210 (1917); and *Assaria State Bank* v. *Dolley*, 219 U.S. 121 (1911).

This Court should not assume, as appellant would have it do, that the rules promulgated by the Supreme Court of Kansas were arbitrarily adopted or made without good

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6. "1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

reason to further a legitimate policy of the state. Appellant's brief is replete with statements and innuendos that he is being singled out by the court for unfair treatment, although no facts are shown to support the insinuations and the record indicates at least some 299 other lawyers are similarly affected (R. 27). Appellant would ask this Court to believe that the Supreme Court of Kansas has formulated rules to capriciously deprive him of his constitutional prerogatives. That the appellant would ascribe such motives to the court is not only unfounded but is grossly unfair. This is not to say that states have not in the past, and will no doubt on occasion in the future, deprive their citizens of a part or a portion of their constitutional rights, but to ascribe such a base claim to the collective motives of the Supreme Court of Kansas is vain in its statement and does not befit a lawyer. The practice of law is an honored profession calling for the very best from its artisans at all times. What other profession can boast that its greatest asset is the opportunity to serve a purpose other than, and far greater than, the self interest of the practitioner. With this as the very basic tenet of our profession, can it be said the highest court of the State of Kansas properly entrusted with the responsibility of demanding the very best of its practicing lawyers, acted capriciously in postulating the rules in question. Or broader still, can this Court not conceive how a classification based on "regularly engaging in the practice of law in another state", serves a reasonable purpose in asking, yea literally demanding, that the rights of litigants be protected to the fullest extent possible and the interest of the general public served by the more exact rendition of true justice in its courts.

CONCLUSION.

It is respectfully urged that since the appellant commenced and maintained this action, seeking a particular remedy to which he was not entitled under the law and the facts, that this appeal should be dismissed. In the alternative, appellee submits that the rules of the Supreme Court of Kansas attacked herein are reasonably designed to attain the public purpose sought and are not in violation of the Fourteenth Amendment and for that reason, the judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

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